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No. 88-2099

In The

Supreme Court of the United States

October Term, 1988

JUGOMETAL ENTERPRISE FOR IMPORT AND EXPORT OF ORES AND METALS,

Petitioner,

v.

MARCUS IRVING, JR. AND FRANKIE IRVING,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a products liability case based on injuries that occurred in the forum, does the foreign supplier that shipped directly into the forum the product that caused the injury have sufficient contact with the forum to allow the constitutionally permissible exercise of personal jurisdiction over the supplier by the forum?

2. Is it "fair and reasonable" for the forum to exercise personal jurisdiction over an alien defendant that has systematically shipped large amounts of its products into the forum for many years, in a suit based on injuries caused by the defendant's products in the forum?

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BRIEF IN OPPOSITION

Respondents Marcus Irving, Jr. and Frankie Irving respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

This is a products liability case in which plaintiff Marcus Irving, Jr.[1] alleges that he sustained respiratory injuries as a result of his exposure to raw asbestos while employed by the Uvalde Rock Asphalt Company (Uvalde) in Houston, Texas from 1955 through 1970. Although twenty-one companies were originally named as defendants in the action, discovery revealed that all the asbestos used at the Uvalde plant from 1955 through 1970 was supplied by petitioner, Jugometal Enterprise for Import and Export of Ores and Metals (Jugometal). The asbestos was sold by Jugometal, an independent Yugoslavian company, to Huxley Development Company (Huxley), an American broker, for immediate resale to Uvalde. Under the contract of sale that it executed with Huxley,[2] Jugometal shipped about 5,000 metric tons of Yugoslavian asbestos per year to the Port of Houston. Jugometal made shipments every two months, and thus arranged for approximately ninety shipments of asbestos to Houston over the fifteen year period.

It is true, as Jugometal states in its petition, that Huxley never advised Jugometal of the identity of the

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[1] In all, 106 plaintiffs have brought similar claims against Jugometal in federal district court in Houston. The district court stayed all of the claims pending resolution of the jurisdictional issue raised in this case.

[2] Although the contract was negotiated and executed in Yugoslavia, it was drafted in English, provided that disputes under the contract were to be resolved under the rules of the American Arbitration Association, and conferred jurisdiction on the courts of New York.

ultimate user of the asbestos that Jugometal had shipped to Houston, presumably for fear that Jugometal would establish a direct relationship with the ultimate user and eliminate the need for Huxley's services as an intermediary. Jugometal was aware at all times, however, of the significant role that Houston played in the transaction. Most obviously, the sales contract executed by Jugometal expressly required that Jugometal ship the asbestos to the Port of Houston in jute bags marked "Huxley/Houston." Jugometal knew that it was critical that it ship the asbestos to Houston and not some other port of entry; on one occasion, when it mistakenly shipped the asbestos to New Orleans, Jugometal was billed for the cost of forwarding the asbestos to Houston. The sales contract also expressly provided that the asbestos would be tested for quality by a Houston laboratory, and that Jugometal would bear half the cost of the testing. Pursuant to the contract, the jute bags in which the asbestos was shipped were returned to Jugometal for reuse; Jugometal was aware that the bags were cleaned before their return by a Houston company. Thus, in spite of Jugometal's ignorance of the precise identity of the user of its raw asbestos shipped to Houston, the strong ties of the transaction to Houston "all pointed to a user in Texas or its vicinity." Petitioner's appendix at 9a.

Despite this evidence that Jugometal purposefully availed itself of the privilege of conducting business in Texas by shipping literally thousands of tons of raw asbestos into the state every year for fifteen years for a profit, Jugometal challenged the ability of the district court to exercise personal jurisdiction over it. In its plead-

ings, Jugometal claimed that it had not maintained "minimum contacts" in the state of Texas sufficient to allow the district court to exercise jurisdiction over it, and claimed that requiring it to respond to suit in that forum would offend traditional notions of fair play and substantial justice. In an effort to establish a factual basis for its motions, Jugometal noticed and took the depositions of five of its officers in Yugoslavia. After briefing by the parties, the special master appointed by the district court to supervise pretrial proceedings recommended that the motion to dismiss filed by Jugometal be granted, and the district court adopted the recommendation.

A unanimous panel of the Fifth Circuit reversed. The court found that "Jugometal reasonably should have anticipated being haled into a Texas court given its contacts with that forum." Petitioner's appendix at 6a. The court also concluded that the assertion of jurisdiction by a Texas court in a case "involv[ing] Texas plaintiffs using a local forum to pursue compensation for alleged injuries that occurred in Texas" (petitioner's appendix at 10a) did not offend traditional notions of fair play and substantial justice. The panel remanded the case to the district court for disposition on the merits. Following denial of Jugometal's request for rehearing en banc, Jugometal filed its petition for a writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT, SUMMARY OF ARGUMENT

The strong facts of this case favoring the exercise of jurisdiction over Jugometal by a Texas court make this

case unworthy of Supreme Court review. Jurisdictional discovery revealed that Jugometal shipped approximately 75,000 tons of asbestos to the Port of Houston over a fifteen year period, and that it had every reason to know that its asbestos was being handled and used in Houston or its vicinity. The Fifth Circuit correctly concluded that Jugometal had thereby purposefully availed itself of the privilege of conducting activities in Texas, subjecting itself to the jurisdiction of the courts of that state.

Respondents do not dispute that *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986) leaves open the question of whether the entry of a defendant's product into a state, without more, subjects the defendant to the exercise of jurisdiction by the courts of that state. But that question is not raised by this case. Instead, this case raises the question of whether a defendant that delivered its products directly into the forum state for many years, with a reasonable anticipation that the products would be used there, can be haled into court in that state on causes of action arising from alleged defects in those products. The Fifth Circuit's answer to that question is consistent with the jurisdictional principles reaffirmed in *Asahi*, and does not conflict with any decision of a federal court of appeals or a state court of last resort. The correctness of the Fifth Circuit's decision is so clear that certiorari should not be granted.

Petitioner's contention that the Fifth Circuit panel failed to accord adequate weight to Jugometal's status as an alien defendant in determining the reasonableness of a Texas court's exercise of jurisdiction over Jugometal in this case is simply wrong. The court explicitly acknowledged *Asahi's* requirement that it give significant weight

to the burdens encountered by an alien defendant forced to defend itself in a foreign legal system in evaluating the fairness of asserting jurisdiction over Jugometal. But the court, following *Asahi*, concluded that the interests of the local plaintiffs and of the forum state in this case outweigh even the burdens that might be placed on Jugometal in requiring it to defend the action in Texas. The Fifth Circuit properly applied the clear language of *Asahi* to the facts of this case and arrived at a logical and legally unassailable result. Whatever the confusion engendered by the *Asahi* opinion, Supreme Court review of the Fifth Circuit's analysis in this particular case would be unhelpful, and is not warranted.

Finally, Jugometal asks this court to grant review based on its limited financial interest in the products entering the jurisdiction. The Fifth Circuit, of course, rejected Jugometal's contention that its role in the shipment of asbestos to Uvalde was too minor to allow a Texas court to exercise personal jurisdiction over it. Jugometal was actually designated in the sales contract as the seller of the raw asbestos, and was itself responsible for performance under the contract. The Fifth Circuit's conclusion that Jugometal's involvement in the transaction was significant enough to support the exercise of jurisdiction over it by a Texas court is supported by the evidence, and should not be the subject of discretionary review.

ARGUMENT

I. THE "MINIMUM CONTACTS" ISSUE LEFT OPEN BY *ASAHI* WOULD NOT BE RESOLVED BY REVIEWING THE FIFTH CIRCUIT'S DECISION IN THIS CASE.

Petitioner Jugometal suggests that this Court should review the Fifth Circuit's decision in this case in order to resolve the question of whether the foreseeable entry of a defendant's product into the forum state, without more, is enough purposeful activity in the forum state to enable the forum to exercise jurisdiction over the defendant. As Jugometal points out, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986), Justice O'Connor, joined by three Justices, expressed the view that additional conduct directed to the forum by the defendant is required to enable the exercise of jurisdiction; an equal number of Justices disagreed, holding that the foreseeable entry of the product into the forum state is sufficient. Were this Court to accept certiorari in this case, however, the issue would remain unresolved. Even under the "additional conduct" test advocated by Justice O'Connor, Jugometal has sufficient contacts with the state of Texas to support the exercise of personal jurisdiction over it by a Texas court. Therefore, the competing principles discussed in the *Asahi* opinions cannot be refined, or even be usefully reviewed, in this case.

The degree of Jugometal's contact with the forum state in this case can best be illustrated by comparing the jurisdictional facts of this case with those in *Asahi*. *Asahi* involved an attempt by the California court to exercise jurisdiction over a Japanese manufacturer (Asahi) who

had sold a product component to a Taiwanese manufacturer (Cheng Shin), who included the component in a product which eventually entered and caused injury in California. The sale took place in Taiwan, and Asahi shipped the product from Japan to Taiwan. 480 U.S. at 114. While Asahi was aware that Cheng Shin sold its products "throughout the world," *Id.* at 106-07, and thus could have foreseen that its components would enter California, it had no direct knowledge of any activities undertaken on its behalf in California and "did not create, control, or employ the distribution system that brought its valves to California." *Id.* at 112.

In contrast, in the instant case, Jugometal shipped thousands of tons of raw asbestos directly to Houston, Texas annually for fifteen years. The entry of its asbestos into Texas was not fortuitous or arbitrary, but was intended by Jugometal. Unlike Asahi, Jugometal purposefully sent its products directly to the forum state. Clearly, Jugometal's "additional conduct" of intentionally shipping its products directly into the forum state would justify the exercise of jurisdiction over Jugometal by the courts of the forum even under Justice O'Connor's more rigorous "minimum contacts" analysis.

Review of the Fifth Circuit's decision in this case would not clarify the constitutional limits on the exercise of personal jurisdiction over a foreign supplier, since Jugometal's contacts with Texas unquestionably satisfy even the stricter of the two proposed standards. Resolution of the *Asahi* split should therefore await presentation of an appropriate case.

II. THE FIFTH CIRCUIT ADEQUATELY CONSIDERED THE BURDEN ON THE ALIEN DEFENDANT IN CONCLUDING THAT THE EXERCISE OF JURISDICTION OVER JUGOMETAL BY A TEXAS COURT IS REASONABLE.

In *Asahi*, this Court recognized "the unique burdens placed upon one who must defend itself in a foreign legal system," 480 U.S. at 114, in holding that the assertion of jurisdiction over the Japanese defendant by the California court was unreasonable and violated the Due Process Clause. Perhaps anticipating the type of jurisdictional challenge asserted in the case at bar, however, the Court also observed that "often the interest of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant." *Id.* The Fifth Circuit properly found the interests of the local plaintiffs and of Texas to far outweigh any arguable burden placed upon Jugometal in requiring it to defend the claim in the place where it shipped its products and where the products caused injury.

Again, a comparison of the jurisdictional facts in *Asahi* and those in the instant case demonstrates the strength of the Fifth Circuit's holding that the exercise of jurisdiction in this case is reasonable and comports with due process requirements. In *Asahi*, neither party to the litigation was a resident of the forum; the transaction upon which the suit was based occurred entirely in a foreign country or countries; the applicability of foreign law was a strong probability, if not a certainty; and the inconvenience of litigating the case in the forum was apparent. 480 U.S. at 114-15. In the instant case, plaintiffs (joined by over 100 other plaintiffs, all claiming similar

injuries resulting from Jugometal's conduct) are citizens of the forum; the injuries occurred in the forum; the applicability of the law of the forum is indisputable;[3] and the majority of witnesses to the transaction upon which suit is based reside in or near the forum. Unlike *Asahi*, this case presents all of the facts necessary to overcome the protection that the Constitution affords to alien defendants. The Fifth Circuit's analysis is so obviously a correct application of the dictates of *Asahi* that review on certiorari would serve no purpose.

Jugometal suggests that the Fifth Circuit's refusal to mention in its opinion Jugometal's small commission on the sales of asbestos to Texas and the time lag between the last sale and the initiation of suit reflects its choice "to ignore concerns of fairness" which require recognition under *Asahi*. Neither Jugometal's small profit nor the latency of plaintiffs' claim, however, bear on the fairness or reasonableness of haling Jugometal into a Texas court to respond to a claim for injuries alleged to have resulted from a product that Jugometal intentionally shipped to Texas. Jugometal has cited, and the Irvings have found, no case in which the reasonableness of jurisdiction depended on whether the business venture conducted in the forum state was successful or profitable.[4] Jugometal's

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[3] *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex.1979).

[4] It must be remembered that although Jugometal's profits from its sales of asbestos to Texas may have been small, its gross sales of asbestos to Texas were enormous, averaging $250,000 per year over the length of its relationship with Huxley. While Jugometal forwarded most of the payments that it received for the asbestos to its supplier, Stragari Mines, the fact remains that payment for the asbestos was made to Jugometal, not Stragari, by the American buyer.

objection to defending a suit based on actions that it took long ago focusses on the time, and not on the place, of suit. If Jugometal's contacts are substantial enough to subject it to the jurisdiction of the Texas courts, the exercise of jurisdiction is not made unfair or unreasonable because the effects of Jugometal's tortious activity did not appear for several years.[5] The Fifth Circuit thus properly refused to consider these two facts, to which the district court referred and upon which Jugometal now relies, in evaluating the reasonableness of the exercise of jurisdiction over Jugometal by a Texas court.

Jugometal also urges the Court to review the Fifth Circuit's opinion to cure that court's refusal to discuss the "international ramifications of an exercise of jurisdiction as discussed by the district judge." Petition at 12. Specifically, Jugometal points out that while the district court discussed the possibility that the exercise of jurisdiction in this case may lead to "reciprocal relaxations" of jurisdictional standards, and noted the difficulties of language barriers and distance faced by Jugometal in defending this action in Texas, the Fifth Circuit's opinion is silent on these matters. The Irvings submit that the Fifth Circuit's silence was well-considered, because the district court's observations are unsound if not preposterous. The district court's proposition that a Texas court's assertion of

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[5] The courts have never applied a concept of laches to the exercise of personal jurisdiction. *See, e.g., Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 593 (5th Cir. 1969) (permitting the exercise of personal jurisdiction over an Oregon corporation by a Texas court even though the product upon which jurisdiction was based had been sold by the defendant twenty years before suit was filed).

jurisdiction over Jugometal, which purposefully shipped its product into Texas, may lead to a Yugoslavian court's legitimate exercise of jurisdiction over the Texas plaintiffs, whose only contact with Yugoslavia is their use of a Yugoslavian product after it was delivered to Texas, is so illogical as to require no discussion by the reviewing court. Similarly, the district court's concern about language barriers facing Jugometal, and Jugometal's anticipated difficulties in defending itself in a foreign legal system, is unjustified when Jugometal's course of conduct in the United States is analyzed. Jugometal did business directly with an American broker; executed the contract of sale in English; maintained an office for a period of time in New York; and, perhaps most importantly, agreed in the contract of sale to the application of American law and to the jurisdiction of American courts. Faced with these compelling facts, the Fifth Circuit properly chose not to discuss the factors deemed important by the district court.

The exercise of jurisdiction over Jugometal by a Texas court unquestionably comports with international standards for exercising jurisdiction over foreign defendants.[6]

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[6] *See, e.g., Reinwater Foundation v. Mines de Potasse d'Alsace, S.A.*, 1976 E.Comm.Ct.J.Rep. 1735, 1749, 1 COMMON MKT. L.R. 284, 301 (1977) (under the guidelines established by the European Economic Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, "the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage."). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §421(2)(j)(1987); H. TEBBEN, INTERNATIONAL PRODUCT LIABILITY 293 (1980).

Because of Jugometal's purposeful and continuous contacts with an American company and the state of Texas, the assertion of jurisdiction by a Texas court would not conflict with, or in any way threaten, Yugoslavia's sovereignty. Additionally, the fairness concerns raised by Jugometal are illusory. While the Fifth Circuit did not explicitly address every argument raised by Jugometal in its briefs or discussed by the district court and special master in their opinions, the court adequately considered all of the factors identified in *Asahi* in arriving at its proper conclusion that the assertion of personal jurisdiction over Jugometal by a Texas court does not offend due process notions of fair play and substantial justice.

III. THE JURISDICTIONAL CONSEQUENCES OF JUGOMETAL'S LIMITED OWNERSHIP INTEREST IN THE ASBESTOS SHIPPED TO TEXAS NEED NOT BE ANALYZED BY THIS COURT, SINCE, TAKEN AS A WHOLE, THE FACTUAL RECORD SUPPORTS THE EXERCISE OF JURISDICTION.

Jugometal suggests that this Court should exercise its power of review to consider the question of whether a broker, as opposed to a manufacturer or retailer, may be subject to the jurisdiction of the courts of the states that its products enter.[7] As the Fifth Circuit pointed out in its

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[7] The Irvings vigorously dispute Jugometal's contention that it cannot be considered the seller of the asbestos that injured Mr. Irving. The contract of sale unequivocally denotes Jugometal as the seller of the asbestos. The American buyer of the asbestos, Huxley, looked to Jugometal, and not to Stragari

(Continued on following page)

opinion, however, the characterization of Jugometal as a mere broker or intermediary, as opposed to a "seller" of the product on which jurisdiction is predicated, is a matter of semantics. Jugometal's proposed distinction begs the essential constitutional question of whether its purposeful contacts with Texas are sufficient to allow the courts of that state to exercise personal jurisdiction over it. This is a fact-specific inquiry that does not involve consequences extending beyond this particular case. Moreover, as explained in Part I, Jugometal's contacts with Texas are unquestionably sufficient to permit the exercise of jurisdiction. There is thus no need to address in depth Jugometal's sub-issue.[8]

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Mines, for performance. Jugometal's rights and obligations vis-a-vis Stragari are of no concern to the Irvings, and have no relevance to the jurisdictional inquiry.

[8] Jugometal's discussion of *Ward v. Baltimore Stevedoring Co.*, 437 F.Supp. 941 (E.D.Pa. 1977) may be answered by citation to *Muller v. Temura Shipping Co.*, 629 F.Supp. 1024 (E.D.Pa. 1986), a case in which a Pennsylvania court exercised personal jurisdiction over a British cargo company because the company knew that its cargo would be discharged at the Port of Philadelphia. 629 F.Supp. at 1026-27. *Ward* and *Muller* make clear that the ability of a court to exercise jurisdiction over a defendant consistent with due process requirements depends on the defendant's involvement with the forum taken as a whole, not simply on whether the defendant has a technical ownership interest in the product entering the forum.

CONCLUSION

Jugometal has failed to present this Court with special and important reasons for granting a writ of certiorari. Granting the writ will not enable this Court to clarify the due process requirement of "minimum contacts," because the facts so clearly support the Fifth Circuit's finding that Jugometal engaged in purposeful activity in the forum that the "minimum contacts" prong is satisfied under any test. Moreover, review of the Fifth Circuit's conclusion that the exercise of jurisdiction over Jugometal is fair and reasonable will not involve development or refinement of legal principles, but will simply involve the application of those principles, announced by this Court in *Asahi* and followed by the Fifth Circuit below, to the unique facts of this particular case. For these reasons, Jugometal's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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